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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

**MMP INVESTMENTS, INC.,**

*Petitioner,*

v.

**LANDER CO., INC.,**

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Should this Court resolve a conflict among the Federal Circuits regarding whether the provisions of § 9 of the Federal Arbitration Act, which fixes venue to confirm arbitral awards in the district where the award is made, are mandatory and jurisdictional, or merely establish alternative venues?

2. Whether the Court of Appeals erred by holding that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) applies to confer federal jurisdiction when the arbitral award sought to be enforced was made in the United States, was governed by United States law, and concerned a dispute solely between two United States citizens?

## PARTIES TO THIS PROCEEDING

The caption of this case contains the names of all the parties to this proceeding. Petitioner MMP Investments, Inc. has no parent corporation nor any subsidiaries.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner, MMP Investments, Inc. ("MMP"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 107 F.3d 476 (7th Cir. 1997). (*See* App. 1-11.) The opinion of the District Court is reported at 927 F. Supp. 1078 (N.D. Ill. 1996). (App. 13-21.)

## JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1997. No rehearing nor suggestion for rehearing *en banc* was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

There are various statutory provisions referred to in this Petition: (1) Article I(1) of the Convention On The Recognition And Enforcement Of Foreign Arbitral Awards of June 10, 1958, 21 U.S.T. 2517 (1970) (the "New York Convention") (as implemented by 9 U.S.C. § 201); (2) the United States declaration of accession to the Convention (21 U.S.T. 2566, reprinted at notes following 9 U.S.C. § 201); and (3) Sections 9 and 202 of the Federal Arbitration Act (9 U.S.C. §§ 9, 202).

Article I(1) of the Convention On The Recognition And Enforcement Of Foreign Arbitral Awards, as implemented by 9 U.S.C. § 201 of the Federal Arbitration Act, states, in pertinent part:

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

21 U.S.T. 2517.

The United States' declaration of accession to the Convention states as follows:

> The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State.

21 U.S.T. 2566.

Section 9 of the Federal Arbitration Act states in pertinent part as follows:

> If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. . . .

9 U.S.C. § 9.

Section 202 of the Federal Arbitration Act states as follows:

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

9 U.S.C. § 202.

## STATEMENT OF THE CASE

### A. Nature Of The Dispute.

This dispute arises out of a petition filed by the Respondent, Lander Co., Inc. ("Lander") seeking to apply the Convention of the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the "New York Convention") (21 U.S.T. 2517), to confirm an arbitral award based upon a business dispute between two U.S. companies involving transactions in Poland. The award, however, was made in the United States (New York), applying New York law, and arose from agreements between MMP and Lander, both of whom are United States citizens (MMP is an Illinois corporation; Lander is a Delaware corporation). The Court of Appeals held that the Convention applied to authorize confirmation of the arbitration award despite the domestic nature of the arbitration process.

In March 1991, Lander and MMP entered into a distribution agreement, which provided that MMP would be the exclusive distributor of Lander's health and beauty care products in Poland for two years. Two years later, both parties entered into a second distribution agreement by which MMP became the exclusive manufacturer and distributor of Lander's products in Poland for another five years. Both distribution agreements contained an arbitration clause that requires any controversy arising under the agreements be arbitrated in accordance with the Rules of Convention and Arbitration of the International Chamber of Commerce (the "ICC") in New York, New York. Both agreements also contained provisions requiring that the terms of the agreements be construed under New York law.

In May 1993, MMP informed Lander that certain of its products were defective. Lander denied the existence of any such problems. After the parties were unable to resolve their dispute, Lander sent MMP notice in February 1994 that it was terminating their relationship under the two agreements. MMP, in turn, filed a request for arbitration with the ICC. Lander countered by filing its own claim for arbitration with the ICC. A New York arbitrator was appointed by the ICC to conduct the arbitration. The arbitration took place in New York.

On October 31, 1995, the arbitrator issued his award in favor of MMP on certain of its claims, and in favor of Lander on its counterclaim. Monetary relief was awarded by the arbitrator to Lander in the amount of $536,444.

**B. Proceedings In The District Court.**

On November 28, 1995, Lander filed a Petition in the United States District Court for the Northern District of Illinois seeking to enforce the arbitration award against MMP obtained exclusively in New York. In its Petition, Lander sought enforcement of the arbitration award under the New York Convention. MMP moved to dismiss Lander's Petition on the grounds that the New York Convention is not available to enforce an arbitral award made in the United States on the basis of an agreement between United States citizens in a dispute governed purely under domestic law (*i.e.*, New York law). In addition, MMP moved to vacate the arbitration award under the Federal Arbitration Act. 9 U.S.C. § 1 *et seq.*

In reaching its decision, the District Court pointed out that there were no reported cases addressing the applicability of the New York Convention to an arbitral award in which (a) the party signatories were United States citizens; (b) the arbitration agreement provided that domestic (in this case, New York) law applied to the parties' dispute; and (c) the arbitration award was made in the United States. (App. 16.) The sole nexus for applying the Convention was that the parties' agreements called for performance of a portion of their contract in a foreign state. Finding the issue presented "as one of first impression" (*Id.*), the District Court granted MMP's motion to dismiss for lack of subject matter jurisdiction, holding that the award did not fall within the definition of a recognizable and enforceable award under the Convention. (App. 19-21.) In arriving at its conclusion, the District Court examined the history behind the New York Convention, finding that the language of the Convention's declaration "limits the enforcement and recognition of arbitral awards on a territorial basis, *that is, to those made in a country other than the United States*." (App. 19.) (emphasis added.) Because the arbitral award was made *in* the United States (specifically, New York), and not in a territory of "another Contracting State," as required under the express language of the Convention (21 U.S.T. 2517), the District Court held that the arbitral award could not be enforced in the United States. Lander's Petition to enforce the arbitral award was therefore dismissed for lack of subject matter jurisdiction. (App. 14, 21.)

**C. The Court Of Appeals' Decision.**

Lander appealed the District Court's dismissal of its Petition to the Seventh Circuit. The Court of Appeals reversed and remanded the District Court's judgment with instructions to reinstate Lander's suit under the Convention. In the process of reversing the District Court's interpretation of the Convention, however, the Seventh Circuit grappled with several important areas of federal law.

First, Judge Posner, writing for the Court, found that subject matter jurisdiction existed to enforce Lander's arbitral award under both the Federal Arbitration Act and the Convention. But in doing so, the Seventh Circuit had to confront initially the issue of whether venue in the Northern District of Illinois was proper under § 9 of the Federal Arbitration Act since Lander's arbitration award was rendered in New York, not Illinois. Under the express terms of § 9 of the Federal Arbitration Act, absent an agreement to the contrary, venue lies in the district in which the award was made. In this case, § 9 dictated that venue to enforce Lander's arbitration award lay in the Southern District of New York. (App. 7.) While the Court of Appeals recognized that § 9 had been interpreted as requiring an *exclusive*, as distinguished from an alternative, venue for confirming arbitration awards, and further acknowledged that other circuits had reached a "contrary" result, the Seventh Circuit, in following its own Circuit precedent, opted to interpret § 9 as being permissive, not mandatory. (*See In re VMS Sec. Litig.*, 21 F.3d 139, 142-45 (7th Cir. 1994) (App. 7.)) Specifically, the Seventh Circuit declined to align itself with the Ninth Circuit decision in *Sunshine*

*Beauty Supplies, Inc. v. United States District Court*, 872 F.2d 310, 312 (9th Cir. 1989), which held that the venue provisions contained in § 9 of the Federal Arbitration Act were mandatory and jurisdictional. (App. 8.) Had the Seventh Circuit followed Ninth Circuit precedent, it would have likely affirmed the District Court's judgment because venue was improper under § 9 of the Federal Arbitration Act in the Northern District of Illinois.

Second, once the Court of Appeals found that the venue provisions in § 9 of the Federal Arbitration Act were not mandatory, an examination of whether Lander's arbitral award could still be enforced under the Convention's terms had to be addressed. Sharply differing with the District Court, the Court of Appeals interpreted Article I(1) of the Convention far more broadly to mean that, even if the arbitration award was *made in the United States*, and involved only United States citizens, the Convention nonetheless governed to enforce the award under its provisions. In other words, despite it being undisputed that the arbitration award was made in the United States, and not "in the territory of another Contracting state," the Seventh Circuit interpreted Article I(1) to allow recognition and enforcement of Lander's arbitration award in the United States. The Seventh Circuit reached this interpretation by reading the United States' declaration of accession to the Convention to mean that the United States will enforce arbitral awards pursuant to the Convention simply if those awards are made in nations that *adhere to* the Convention. (App. 10.) And since here the arbitral award was made in the United States, which is "another signatory of the Convention," (*Id.*), the Seventh Circuit reasoned that the

award could be enforced under the New York Convention in the United States. (*Id.*) Stated differently, since the United States only will enforce arbitration awards made in nations that also adhere to the Convention, which necessarily includes the United States itself, the Convention can be used to enforce arbitration awards wholly between United States citizens, if, as here, the dispute arose out of a contract that involved a portion of the parties' performance in a foreign country. (*Id.*) In arriving at this novel interpretation of the Convention's language, the Court of Appeals cited no Supreme Court precedent, no federal circuit authority to support its conclusion, nor any Congressional or legislative history. Simply stated, the Seventh Circuit's decision was the first of its kind.

## REASONS FOR GRANTING THE WRIT

MMP's Petition offers this Court the opportunity to authoritatively resolve, in a single decision, two related emerging issues of federal law in the arbitration sphere which this Court has never addressed. The first issue provides this Court with the chance to resolve the clear split in the Circuit Courts of Appeal regarding whether § 9 of the Federal Arbitration Act should be interpreted as requiring an exclusive venue in the district in which the arbitral award was rendered, or merely a permissive venue. The Seventh and Ninth Circuits already have each taken diametrically opposed views on this very issue; further splits should not be necessary to demonstrate the need for Supreme Court guidance. Certainly, the continued existence of divergent approaches offered

in different circuits on the interpretation of the same federal statute does little to foster uniformity of a federal enactment that is designed to have an international flavor. Given the scores of arbitration cases filed each year in federal court, the importance of settling the meaning ascribed to § 9 of the Federal Arbitration Act is clear so that litigants and courts alike will conclusively know where arbitration awards may be enforced in the federal system.

The second issue likewise offers this Court the opportunity to interpret an important international treaty in which the United States has long been a party signatory (along with 105 other nations), and which implicates the use of commercial arbitration as a dispute resolution mechanism. In this day and age of economically borderless nations, arbitration agreements that call for international performance with international effects are becoming far more common place as businesses reach out and have global impact. Members of this Court have so recognized. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S., 614, 638 (1985) ("As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade."). The extent, however, to which federal court jurisdiction can be invoked exclusively by citizens of the United States to enforce on arbitration award rendered in the United States under an international treaty merits authoritative review.

## I.

**BY GRANTING MMP'S WRIT, THIS COURT CAN RESOLVE THE CONFLICT AMONG THE FEDERAL CIRCUITS WHETHER § 9 OF THE FEDERAL ARBITRATION ACT REQUIRES ARBITRATION AWARDS TO BE CONFIRMED EXCLUSIVELY IN THE DISTRICT IN WHICH THE AWARD WAS ENTERED.**

Lander, the Respondent, obtained a favorable arbitration award against MMP in New York. Lander, however, never sought to confirm that arbitration award in the United States District Court for the Southern District of New York, as contemplated by the express language of § 9 of the Federal Arbitration Act. Rather, Lander filed a petition to confirm that award in the United States District Court for the Northern District of Illinois. The Seventh Circuit found this variance in venue to be immaterial, holding that § 9 of the Federal Arbitration Act "merely creates alternatives to conventional venue." (App. 7.) In so doing, the Seventh Circuit openly recognized that its opinion was directly "contrary" to the Ninth Circuit's decision in *Sunshine Beauty Supplies, Inc. v. United States District Court,* 872 F.2d 310, 312 (9th Cir. 1989). (App. 8.) But this split is not merely confined to that of the Seventh and Ninth Circuits, for nearly all of the other federal circuits as well have contributed to the lack of uniformity in interpreting § 9. MMP's Petition would provide this Court with the opportunity to authoritatively resolve this deepening divergence of opinion on an important question of federal jurisdiction.[1]

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[1] On appeal before the Seventh Circuit, Lander relied, in part, on § 9 of the Federal Arbitration Act as one of its grounds for the exercise of federal subject matter jurisdiction.

The controversy underlying this statutory dispute is relatively straightforward: does § 9 of the Federal Arbitration Act designate the district court where the award was made as the *only* court for jurisdictional purposes to confirm an arbitration award, or alternatively, does the Act merely permit jurisdiction and venue in that court? The federal courts are hopelessly divided on this very issue.

The Ninth Circuit has long interpreted the venue language in §§ 9 and 10 of the Federal Arbitration Act as being strictly mandatory. *See, e.g., Central Valley Typographical Union, No. 46 v. McClatchy Newspapers,* 762 F.2d 741, 744 (9th Cir. 1985); *United States ex rel. Chicago Bridge & Iron Co. v. Ets-Hokin Corp.,* 397 F.2d 935, 939 (9th Cir. 1968). When *Sunshine Beauty* was decided, the Ninth Circuit pointed out that "[t]here is a split of authority among the circuits as to whether section 9's venue provision is mandatory." *Sunshine Beauty,* 872 F.2d at 311.[2] Similarly, the Fifth and Sixth Circuits have construed § 9 to mandate exclusive jurisdiction and venue lying in the district court in which the arbitration award was made. *See, e.g., Island Creek Coal Sales Co. v. City of Gainsville, Florida,* 729 F.2d 1046, 1050 (6th Cir. 1984); *City of Naples v. Prepakt Concrete Co.,* 490 F.2d 182, 184 (5th Cir. 1974). So, too, have

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[2] While there is certainly a split of authority on whether § 9's venue provision is mandatory or permissive, conversely, courts that have ruled on the issue have agreed that the venue provisions of §§ 9 and 10 are to be interpreted with uniformity because they are "essentially identical actions." *Sunshine Beauty Supplies,* 872 F.2d at 312 n.4. Even the Seventh Circuit acknowledges this "near unanimity of opinion. . . ." *In re VMS Sec. Litig.,* 21 F.3d 139, 142 (7th Cir. 1994).

federal district courts sitting within the Eighth, Fifth and Third Circuits, respectively, adopted the mandatory approach to the venue provisions in §§ 9 and 10. *See, e.g., Tesoro Petroleum Corp. v. Asamera (South Sumatra) Ltd.*, 798 F. Supp. 400, 403 (W.D. Tex. 1992); *Soo Line R.R. Co. v. Chicago & Northwestern Transp. Co.*, 737 F. Supp. 68, 69 (D. Minn. 1990); *Enserch Int'l Exploration, Inc. v. Attock Oil Co.*, 656 F. Supp. 1162, 1165-66 (N.D. Tex. 1987); *Arthur Imerman Undergarment Corp. v. Local 162, Int'l Ladies' Garment Workers Union*, 145 F. Supp. 14, 17 (D.N.J. 1956). As one federal district court has held, the reason for construing the statute in this fashion is clear: "'may' [as used in § 9] does not refer . . . to *which* court is authorized to vacate an arbitration award, but to the permissive nature of the *relief* that the district court is empowered to grant." *Tesoro Petroleum Corp.*, 798 F. Supp. at 404 (emphasis added); *see also Enserch Int'l Exploration*, 656 F. Supp. at 1165.

In direct contrast to these decisions making venue to enforce an arbitration award mandatory in the district where the award is made, other courts have found the language in §§ 9 or 10 of the Federal Arbitration Act to be permissive. These courts typically reason that "Congress would have used stronger language than 'such application may be made' or 'may apply' if the intention was to restrict the power of a federal court in Arbitration Act cases." *Paul Allison, Inc. v. Minikin Storage of Omaha, Inc.*, 452 F. Supp. 573, 574 (D. Neb. 1978). Circuits taking the permissive approach to the venue statute include the Seventh Circuit (*e.g., In re VMS Sec. Litig.*, 21 F.3d 139, 145 (7th Cir. 1994) (and cases cited therein)), and the Second Circuit (*Smiga v. Dean Witter*

*Reynolds, Inc.*, 766 F.2d 698, 706 (2d Cir. 1985); *Motion Picture Lab. Technicians Local 780 v. McGregor & Werner, Inc.*, 804 F.2d 16, 18 (2d Cir. 1986). District Court decisions within each of the Second, Third, Fourth, Fifth, Seventh, Eighth and Eleventh Circuits have likewise adopted the permissive approach to venue under the Federal Arbitration Act. *See, e.g., United States ex rel. Kirchdorfer v. Aegis/Zublin Joint Venture*, 869 F. Supp. 387, 390-91 (E.D. Va. 1994); *Dombrowski v. Swiftships, Inc.*, 864 F. Supp. 1242, 1252-53 (S.D. Fla. 1994); *Elgart v. Sono-Tek Corp.*, Cir. A. No. 88-7539, 1989 WL 136280 (E.D. Pa. Nov. 9, 1989); *Concourse Beauty School, Inc. v. Polakov*, 685 F. Supp. 1311, 1315 (S.D.N.Y. 1988); *Wing v. J.C. Bradford & Co.*, 678 F. Supp. 622, 626 (N.D. Miss. 1987); *Amalgamated Clothing and Textile Workers Union v. Federation of Union Reps.*, 664 F. Supp. 995, 996 (S.D.W.Va. 1987); *NII Metals Servs., Inc. v. ICM Steel Corp.*, 514 F. Supp. 164, 166 (N.D. Ill. 1981); *Paul Allison, Inc.*, 452 F. Supp. at 574-75.

The conflict among the Circuits reflects a fundamental disagreement over the interpretation of a federal statute. Indeed, the split is deep within the federal courts, with at least five Circuit Courts of Appeal having addressed the issue presented, resulting in a divergence of opinion. (*Compare* the Fifth, Sixth and Ninth Circuits taking the "mandatory" approach to venue, *with* the Second and Seventh Circuits adopting the "permissive" interpretation.) Such a conflict unnecessarily breeds not only a lack of uniformity in decision-making, but provides litigants with the ability to "forum shop" in an effort to find the most favorable venue available to them when seeking to confirm an arbitration award. Maneuvering of this kind certainly could not have been intended by the drafters of

§ 9 when they enacted the venue provision, and a substantial body of federal law already exists to support this position. In view of the importance of an authoritative answer to this question of federal law, this Court's guidance is necessary to settle this vexing procedural issue.

## II.

## THE SEVENTH CIRCUIT HAS UNDULY EXPANDED THE SCOPE OF THE NEW YORK CONVENTION TO INCLUDE ARBITRAL AWARDS MADE IN THE UNITED STATES THAT CONCERN DISPUTES SOLELY BETWEEN UNITED STATES CITIZENS.

The District Court below held that the New York Convention could not be invoked to recognize and enforce an arbitral award that was made in the United States, governed by United States law, and which involved a commercial dispute exclusively between two United States citizens. Despite this seemingly logical conclusion reached by the District Court, the Seventh Circuit reversed. In reaching its decision, however, the Seventh Circuit rejected the plain meaning of Article I(1) of the Convention, holding that, even though the arbitral award was *not* made in another State (the award being made in the United States), recognition and enforcement under the Convention nonetheless could proceed in the United States. (App. 10.) The Seventh Circuit went on to find the United States arbitration award to be "nondomestic" under Article I(1) despite the arbitration, the parties and the rule of decision, all being centered in the United States. Only the performance of the parties' contract involved a foreign country, and the Seventh Circuit relied on that fact to bring the Convention into play. (*Id.*). The Seventh Circuit cited no case authority inter-

preting the Convention in such a fashion. In fact, the District Court below specifically held that it had "found no other cases addressing the applicability of the Convention" to embrace such core domestic matters. (App. 16.) Because the Seventh Circuit's decision unduly expands the reach of the Convention far beyond its express terms, intervention by this Court is warranted in order to restore the Convention's usage to its originally intended function: enforcement of international arbitration awards.

The Convention was originally adopted in 1958, having been sponsored by the United Nations. The United States, however, did not become a signatory to the Convention until declaring its accession 12 years later, in 1970. (21 U.S.T. 2566.) Shortly thereafter, Congress enacted legislation implementing the Convention as a basis for empowering federal courts to enforce its provisions. *See* 9 U.S.C. §§ 201-208. As part of this legislation, Congress vested the federal district courts with original jurisdiction over any action or proceeding "falling under the Convention," since such actions are deemed to "arise under the laws and treatises of the United States." 9 U.S.C. § 203. Article I(1) of the Convention defines the types of arbitral awards enforceable under its provisions, and contains two criterion for its application. One is territorial, that is, the arbitration award must be made in the territory of another contracting state. The other criterion includes arbitral awards "not considered as domestic awards in the State where there recognition and enforcement are sought" ("nondomestic" arbitration awards). (Convention, Article I(1).) In other words, while the Convention always applies to the recognition and enforcement of an arbitral award made in another State, it may also apply if the award is considered to be

"nondomestic." *See* Albert Jan van den Berg, *When Is an Arbitral Award Nondomestic Under the New York Convention of 1958?*, 6 Pace L. Rev. 25, 39 (1985). The Seventh Circuit substituted its own unchartered reasoning for that contained in the express terms of the Convention by misapplying both prongs under Article I(1).

As the District Court noted, in adopting the Convention as a party signatory, the United States made a binding declaration:

> The United States will apply the Convention, on the basis of reciprocity, to the recognition and enforcement *of only those awards made in the territory of another Contracting State*.

21 U.S.T. 2566, reprinted at notes following 9 U.S.C. § 201 (emphasis added). Contrary to the Seventh Circuit's interpretation, other circuits have sided with the District Court's decision below, finding the United States' declaration of accession to be an important limitation on the scope of the Convention. *See, e.g., Ministry of Defense v. Gould, Inc.*, 887 F.2d 1357, 1362 (9th Cir. 1989) ("The United States imposes an additional related condition on the award: it must be '*made in the territory of another Contracting State*.'") (emphasis added).

This Court has long held that the principal purpose of the Convention "was to encourage the recognition and enforcement of commercial arbitration agreements *in international contracts. . . .*" *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) (emphasis added); *accord Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 658 (1985). In fact, over a decade ago, this Court remarked that the Convention contemplates "exceptions to arbitrability grounded in domestic law." *Mitsubishi*, 473 U.S. at 638 n.21.

It is undisputed that the parties' arbitration was not in any fashion made abroad; rather it was domestic in nearly every sense of the word. The underlying dispute was between two domestic corporations: one located in Illinois and the other in New Jersey. The arbitration between these two United States citizens was, in turn, conducted exclusively in New York and governed by New York substantive law. Finally, the arbitrator issued his award in New York. These factors logically rendered the arbitration to have been made in the United States, rather than "in the territory of another Contracting State," as required by Article I(1) of the Convention.[3] Yet, despite the arbitration award having all of these core domestic attributes, the Seventh Circuit found the Convention applicable. The Seventh Circuit's decision not only distorts the plain language of Article I(1) to the Convention, but openly ignores the United States' twenty-seven-year-old declaration of accession to the Convention: that the *enforcement* of an arbitration award in the United States could only occur when the award was *made abroad*—not in the United States. (*See* 21 U.S.T. 2566.) While cases are no doubt legion in applying the Convention to enforce arbitration awards where at least one of the party signatories to the arbitration agreement

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[3] The arbitration in New York was conducted pursuant to the Rules of Conciliation and Arbitration of the International Chamber of Commerce. Article 22 of those Rules states: "The arbitral awards shall be deemed to be made at the place of the arbitration proceedings and on the date when it is signed by the arbitrator."

is a foreign national,[4] until the Seventh Circuit's opinion, none has ever expanded the reach of the Convention to embrace the present dispute, where the only international nexus is that a portion of the parties' performance of the agreement occurred abroad.

By judicial fiat, the Seventh Circuit has now enlarged the Convention as a fountainhead conferring federal jurisdiction anytime an arbitration award is rendered in the United States between United States citizens where the dispute arises out of a contract that has at least some performance in a foreign state. Nothing in the Convention permits such an expansive interpretation. Quite the contrary, the United States, when becoming a party to the Convention, rejected that very construction. (21 U.S.T. 2566.) So also has a leading commentator on the Convention. *See,* Albert Jan van den Berg, *When Is an Arbitral Award Nondomestic Under the New York Convention of 1958?*, 6 Pace L. Rev. 25, 50 (1985) (nothing in actual text nor in treaty's legislative history allows for enforcement of an arbitral award *made in the same country in which the award was entered*). Supreme Court guidance has now become essential to restore the Convention back to its intended purpose.

The Seventh Circuit held that the United States' accession declaration, which limited the application of the Convention in the United States to those arbitral

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[4] *E.g., Malarky Enters. v. Health Care Technology, Ltd.,* No. Civ. A. 96-2254-GIV, 1997 WL 219900, at *1 (D. Kan. Apr. 29, 1997) ("The arbitration provision at issue, revolving around a commercial agreement between entities of different nations to arbitrate in a foreign country, is governed by the [New York Convention].").

awards made *outside* of the United States, should be ignored in favor of reading § 202 of the implementing legislation in isolation. (App. 10-11.) Section 202 provides that awards arising from a relationship between United States citizens may be enforced under the Convention provided that the "relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." 9 U.S.C. § 202. The District Court understandably rejected this approach, finding that "[s]uch an interpretation would create an inconsistency" between the accession declaration and the implementation language in § 202. (App. 20.) In reversing, the Seventh Circuit ignored long-standing precedent from this Court that "[a] treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed." *Cook v. United States,* 288 U.S. 102, 120 (1933). The Seventh Circuit never pointed to any such "clearly expressed" intent when Congress enacted § 202 of the Federal Arbitration Act, because none exists.

The District Court correctly recognized that Article I of the Convention, not § 202 of the Federal Arbitration Act, defines the contours of what arbitral agreements and awards may be enforced pursuant to the Convention's terms. (App. 19.) Section 202 does not come into play unless an arbitral award satisfies the criterion of Article I(1). The Seventh Circuit cited nothing in the text, legislative history or case law suggesting that § 202 of the Federal Arbitration Act statutorily grants a party *additional* rights to enforce an arbitral award in the United States beyond the limits set forth in the Convention. By its own terms, the implementing legislation of the Con-

vention merely provides the mechanism by which Congress enacted the Convention. 9 U.S.C. § 201 *et seq.* This Court has expressly so stated. *Scherk v. Alberto-Culver Co.*, 417 U.S. at 520 n. 15 ("In 1970 the United States acceded to the treaty . . . and Congress passed Chapter 2 of the United States Arbitration Act, 9 U.S.C. § 201 *et seq.*, in order to implement the Convention.").

Without any textual or case law to support it, the Seventh Circuit has now impermissibly rewritten the scope of an international treaty to include domestic arbitration awards that are made entirely in this country, applying the domestic laws of the United States, and concerning commercial contracts entered into exclusively between United States citizens. Review by this Court is necessary to return the Convention back to its proper role, which is to enforce commercial arbitration agreements "in international contracts. . . ." *Scherk v. Alberto-Culver,* 417 U.S. at 520 n. 15; *accord Vimar Seguros Reaseguros, S.A. v. M/V Sky Reefer*, ___ U.S. ___, 115 S. Ct. 2322, 2329 (1995).

## CONCLUSION

There is no reason to believe that the conflict among the Circuit Courts of Appeal, as well as the lower federal district courts, over the interpretation of the venue provisions of § 9 of the Federal Arbitration Act will resolve itself. Intervention by this Court is the only feasible solution to authoritatively decide this important federal procedural issue. Moreover, the Seventh Circuit's decision has unduly expanded the scope of an international treaty so that it now includes, for federal jurisdic-

tional purposes, any arbitration agreement exclusively entered into between United States citizens, governed by domestic law, and which arbitration awards are rendered in this country, simply because the dispute involves the performance of a portion of a contract in a foreign state. Nothing in the language of the Convention, nor in the United States' declaration of accession, supports such an expansive interpretation.

Therefore, MMP respectfully asks this Court to grant this Petition, set this case for full briefing and argument, and reverse the Seventh Circuit's decision.

Dated: May 16, 1997.

Respectfully submitted,

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# APPENDIX

# IN THE
# UNITED STATES COURT OF APPEALS
# FOR THE SEVENTH CIRCUIT

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No. 96-2684

LANDER COMPANY, INC.,

*Plaintiff-Appellant,*

*v.*

MMP INVESTMENTS, INC.,

*Defendant-Appellee.*

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Appeal from the United States District Court
for the Northern District of Illinois, Western Division.
No. 95 C 50325—**Philip G. Reinhard,** *Judge.*

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ARGUED JANUARY 8, 1997—DECIDED FEBRUARY 18, 1997

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Before POSNER, *Chief Judge,* and COFFEY and DIANE P. WOOD, *Circuit Judges.*

POSNER, *Chief Judge.* This is a suit by the Lander Company against MMP Investments to enforce an arbitration award. The district court dismissed the suit for want of federal jurisdiction, 927 F. Supp. 1078 (N.D. Ill. 1996), and Lander appeals. The parties are American firms that made a contract (actually two contracts, but we can ignore that detail) for the distribution by MMP in Poland of shampoos and other products manufactured by Lander in the United States. The contract provides that disputes under it shall be settled by binding arbitration in New York City pursuant to the arbitration rules of the International Chamber of Commerce. The parties had a fall-

ing out, Lander notified MMP that it was terminating the contract, and the latter filed a request for arbitration with the International Court of Arbitration, an organ of the International Chamber of Commerce. Lander did not contest the jurisdiction of the Court of Arbitration. The dispute proceeded to arbitration in New York City before a New York lawyer designated by the Court, who after five days of evidentiary hearings decided in favor of Lander, awarding it more than $500,000 plus interest.

The arbitration rules of the International Chamber of Commerce make arbitration awards final and deem the parties by submitting their dispute to arbitration "to have waived their right to any form of appeal insofar as such waiver can validly be made." ICC Rules of Arbitration Art. 24(2). MMP refused to pay the award, so Lander brought this suit to enforce it in the federal district court in Chicago, which is MMP's home. The complaint (captioned "petition to confirm") recites the diverse citizenship of the parties, notes that the United States is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, 21 U.S.T. 2517 (1970) (the "New York Convention," as it is known), claims that the suit arises under the Convention and its implementing legislation, specifically 9 U.S.C. § 207, and states that the district court "has jurisdiction under 9 U.S.C. §§ 1, 9, 201, 202, 203 and 207, and under 28 U.S.C. §1332" and that the amount in controversy (exclusive of interest and costs) exceeds $50,000. When the complaint was filed this was the minimum amount in controversy specified by 28 U.S.C. § 1332, the statute that confers diversity jurisdiction on the federal courts. The amount has since been raised to $75,000.

MMP moved to dismiss the suit on the ground that the New York Convention was inapplicable to the parties' arbitration; but in addition it moved to vacate the award. The Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, allows only three months for mounting a judicial challenge to an arbitration award that is subject to the Act, 9 U.S.C. § 12, and MMP was concerned, as it explained to the district

court, that "although Lander takes the position now that the Arbitral Award is covered by the New York Convention, other allegations in its Petition to Confirm suggest that if it is unsuccessful under the Convention, it will seek to enforce the Arbitral Award under the Federal Arbitration Act." Under the Act, if you fail to move to vacate an arbitration award you forfeit the right to oppose confirmation (enforcement) of the award if sought later by the other party. *Chauffeurs, Teamsters, Warehousemen & Helpers v. Jefferson Trucking Co.*, 628 F.2d 1023, 1027 (7th Cir. 1980); *Taylor v. Nelson*, 788 F.2d 220, 225 (4th Cir. 1986); *Florasynth v. Pickholz*, 750 F.2d 171, 174-77 (2d Cir. 1984); 4 Ian R. Macneil, Richard E. Speidel & Thomas J. Stipanowich, *Federal Arbitration Law* § 38.3.3.2 (1994). In contrast, the New York Convention contains no provision for seeking to vacate an award, although it contemplates the possibility of the award's being set aside in a proceeding under local law, Art. V(1)(e), 21 U.S.T. at 2520, and recognizes defenses to the enforcement of an award.

MMP asked the district judge to defer ruling on its motion to vacate until the judge decided whether the New York Convention was applicable. Lander opposed the motion, taking vigorous exception to MMP's contention that the New York Convention did not apply. It did not argue that the arbitration award was enforceable under the Federal Arbitration Act. There were no other filings, and no oral argument, before the district judge ruled on the motions. He held that the New York Convention did not apply, and went on to dismiss the suit without mention of the Federal Arbitration Act. The Act's one-year statute of limitations (9 U.S.C. § 9) would bar Lander from filing a new suit under the Act. So far as appears, Lander has no other judicial remedy to enforce its award, though conceivably it could sue to enforce it in Poland, hoping MMP has assets there.

The judge should not have dismissed Lander's suit, at least on jurisdictional grounds. The complaint sufficient-

ly alleged jurisdiction under the Federal Arbitration Act as well as under the New York Convention. No other purpose than to allege jurisdiction under the Act can be assigned to the allegation of diversity jurisdiction and the citation of 28 U.S.C. § 1332, the diversity statute, and 9 U.S.C. § 9, the provision of the Federal Arbitration Act that authorizes suits in federal court to enforce arbitration awards in cases arising out of maritime contracts or contracts evidencing a transaction involving interstate or foreign commerce, 9 U.S.C. §§ 1, 2; no one doubts that the contract between Lander and MMP falls into the second category. The allegation of diversity was necessary because the substantive law applicable to the resolution of the parties' dispute is not federal, and the Federal Arbitration Act is limited to arbitration agreements or awards that arise out of disputes that could be litigated in federal court. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25 n. 32 (1983); *Amgen, Inc. v. Kidney Center of Delaware County, Ltd.*, 95 F.3d 562, 567 (7th Cir. 1996); 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3569, pp. 170-72 (2d ed. 1984). Chapter 2 of Title 9, the chapter that creates jurisdiction to enforce awards made under the New York Convention, is not so limited, 9 U.S.C. § 203, and citation of the diversity statute would thus have been unnecessary had Lander thought that the district court had jurisdiction only by virtue of the Convention.

MMP's motion to vacate the arbitration award under the Federal Arbitration Act shows that it realized that Lander intended to base jurisdiction on the Act if necessary, and of course MMP said as much. The only basis for arguing that Lander waived jurisdiction under the Act is thus its failure, in responding to the motion to vacate, to confirm MMP's suspicion that the Act was indeed an alternative ground of jurisdiction. The district judge overlooked the significance of the allegation of diversity. He said that "the allegations pertaining to diversity jurisdiction . . . are merely surplusage as there are no non-

federal claims presented by the petition to confirm." 927 F. Supp. at 1078 n. 1. Was this oversight a product of deception by Lander? We think not. The thrust of MMP's response to the suit was to challenge jurisdiction under the New York Convention, and it was to this challenge that Lander replied. One reason for Lander to refrain from discussing an alternative basis for jurisdiction was that MMP was not arguing that the Federal Arbitration Act was inapplicable—indeed was acknowledging that it might be applicable. Lander was reasonable, if in retrospect incautious, in assuming that even if the district court agreed with everything that MMP was arguing, the only consequence—because the only relief sought by MMP—would be that the court would dismiss so much of the complaint as depended on the New York Convention and proceed to adjudicate the rest of the complaint under the Federal Arbitration Act.

In any event a "waiver" of jurisdiction in the sense not of a deliberate choice to forgo basing jurisdiction on a particular statute but of an inadvertent failure to cite the statute (so "forfeiture" is the better term than "waiver") is entitled to less weight than a waiver of a substantive ground for relief. *Glisson v. U.S. Forest Service*, 55 F.3d 1325, 1328 (7th Cir. 1995); *Buethe v. Britt Airlines, Inc.*, 749 F.2d 1235, 1238-39 (7th Cir. 1984); 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1210, pp. 121-22 (2d ed. 1990). The court either has jurisdiction or it does not. If it is pretty obvious that it has jurisdiction, the failure to cite the right statute is harmless and ought not lead to a forfeiture, as it would here, assuming the inapplicability of the New York Convention, because of the one-year statute of limitations for suits to enforce arbitration awards under the Federal Arbitration Act. When a district judge sees a request to confirm an arbitration award coupled with an allegation of diversity jurisdiction, a light bulb labeled "Federal Arbitration Act" ought to flash in his head; it is not an esoteric basis of federal jurisdiction. It is quite otherwise with the substantive allegations in a complaint. A plain-

tiff typically makes a selection on tactical grounds from a menu of possible grounds for asserting liability, and the district judge is in no position to guess which omitted grounds were omitted by sheer oversight and ought to be restored later.

The waiver argument fails for the further reason that it itself was waived, by MMP's conduct in this dispute, beginning with the contract, in which it agreed to *binding* arbitration. To agree to binding arbitration is to agree that if your opponent wins the arbitration he can obtain judicial relief if you refuse to comply with the arbitrator's award. Were there a rule that no one could be ordered by a court to pay an arbitration award unless he agreed to submit himself to the court's jurisdiction, the signing of the agreement to *binding* arbitration would be a waiver of the rule. To invoke arbitration pursuant to such an agreement, as MMP also did, is further to agree to be bound, if necessary through court action, by the arbitrator's award, provided, of course, that the award does not have any infirmity of a sort that a court can use to invalidate an arbitration award. Imagine MMP's indignation if it had won the arbitration and Lander had denied that any court in the United States had jurisdiction to enforce the award.

Objections to subject-matter jurisdiction cannot be waived. But that is not the issue. By assumption there is jurisdiction under the Federal Arbitration Act. MMP's argument is that, even so, Lander cannot invoke that jurisdiction, because it failed to allege it more emphatically. The argument, in short, is not jurisdiction; it is waiver; and waiver arguments, unlike jurisdictional arguments, are waivable. E.g., *United States v. Archambault*, 62 F.3d 995, 998 (7th Cir. 1995).

We cannot stop here. We have assumed rather than established that the district court had jurisdiction under the Federal Arbitration Act. And even if it does, if there are differences between that Act and the New York Convention that are material to the resolution of Lander's suit,

we may have to decide whether the Convention applies. The Convention (including its implementing legislation) is more than a statute that confers jurisdiction; it contains procedural provisions besides; if it is inapplicable, but the court has jurisdiction on some other basis, its inapplicability may still affect the course of the suit. It has, for example, a longer statute of limitations—three years rather than one. 9 U.S.C. § 207. That is not a factor here. But if a court asked to enforce an arbitration award has less authority to turn down the request (in whole or part) under the Convention than under the Federal Arbitration Act, this could make a difference in this case—and may be why Lander, the enforcing party, was so eager to bottom jurisdiction on the Convention. One court, noting that manifest disregard of the law is an implied ground for vacating an award under the Act, but neither an express nor, the court thought, an implied defense to enforcement under the Convention, has held that it is indeed harder to knock out an award under the Convention. *M & C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 850-51 (6th Cir. 1996). We need not decide whether this is right; the issue (expressly left open by the Second Circuit in *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 977 (2d Cir. 1974)) has not been argued to us. It is enough that it *may* be right, meaning that whether the Convention is applicable may make a difference even though jurisdiction is secure under the Federal Arbitration Act.

And it is secure. It is true that the provision of the Act that confers jurisdiction on the federal courts to confirm arbitration awards authorizes confirmation only in the court specified in the arbitration agreement (none was specified) or in the district in which the arbitration was conducted, which was the Southern District of New York rather than the Northern District of Illinois. 9 U.S.C. § 9. But this provision of section 9 merely creates alternatives to conventional venue, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lauer*, 49 F.3d 323, 329 (7th Cir. 1995); *In re VMS Securities Litigation*, 21 F.3d 139, 142-45 (7th

Cir. 1994), rather than exclusive venues for confirming arbitration awards. (Some earlier cases in other circuits, discussed in *VMS*, are contrary, e.g., *Sunshine Beauty Supplies, Inc. v. U.S. District Court*, 872 F.2d 310, 312 (9th Cir. 1989), but they contain no arguments for their interpretation.) The district in which the defendant resides is a conventional venue for civil cases. There is no reason to force Lander to go to another district that would be less convenient for *both* parties, which is why those contrary decisions are not persuasive.

It could also be argued that the New York Convention was intended to be exclusive within its domain. We would then *have* to consider its applicability to this case because if it were applicable there would be no jurisdiction under the Federal Arbitration Act. Nothing in the Convention or its history, or in the implementing legislation or *its* history, suggests exclusivity, and it would be particularly perverse in a case such as this involving a dispute squarely within the scope of the Federal Arbitration Act between two U.S. firms. In fact, Article VII of the Convention provides that the Convention shall not "deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon." 21 U.S.T. at 2520-21. We agree with the Second Circuit that there is "no reason to assume that Congress did not intend to provide overlapping coverage between the Convention and the Federal Arbitration Act." *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 934 (2d Cir. 1983).

So there is jurisdiction under the Act but we still have to consider whether the course of the suit may be affected if the New York Convention is also applicable. Although the Convention is not exclusive, the U.S. implementing legislation provides that in the event of a conflict between its terms and those of the Federal Arbitration Act the Convention's terms govern. 9 U.S.C. § 208; *M & C Corp. v. Erwin Behr GmbH & Co., KG, supra*, 87 F.3d at 851. We noted earlier that the scope of judicial review under

the two regimes may be different. The only substantive defense to the enforcement of the award that MMP claims to have, however, is a defense that part of the award was based on a matter that had not been submitted to the arbitrator; in other words, that the arbitrator had exceeded his terms of reference. And that is a defense under both the Federal Arbitration Act and the New York Convention. Compare 9 U.S.C. §§ 10(a)(4), 11(b), with Article V(1)(c) of the Convention. The wording is slightly different but there is no reason to think the meaning different. *Management & Technical Consultants S.A. v. Parsons-Jurden Int'l Corp.*, 820 F.2d 1531, 1534 (9th Cir. 1987); *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, *supra*, 508 F.2d at 976. So we do not have to decide whether the Convention also applies to this case. But we think we should decide. The possible difference in the scope of judicial review that we mentioned earlier could still make a difference in the outcome of this case, because the litigation is in an early stage and MMP may want and be permitted by the district court to interpose a defense of manifest disregard of law by the arbitrator. Moreover, the issue of the Convention's applicability has been fully and ably briefed and vigorously argued, and is bound to recur (under conditions no more favorable for decision) with the expansion of foreign activities by U.S. firms.

Article I(1) provides that the Convention shall apply not only to arbitral awards made in a different country from the one in which enforcement is sought (not the case here) but also to "arbitral awards not considered as domestic awards" in the country in which enforcement is sought. Article I(3), however, authorizes a country "on the basis of reciprocity [to] declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State." And in its declaration of accession the United States along with many other signatories announced that it "will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the

territory of another Contracting State." 21 U.S.T. at 2566; see notes following 9 U.S.C.A. § 201. Read no further, says MMP; the arbitration award in this case was made in the United States, not in another contracting state. But as natural a way to read the declaration is that the United States will enforce pursuant to the Convention only arbitral awards made in nations that also adhere to the Convention. This is the significance of the reference to reciprocity. The United States will not enforce an arbitration award made in a country that, by failing to adopt the Convention, has not committed itself to enforce arbitration awards made in the United States. Granted, "a Contracting State" would be clearer, but "another Contracting State" is clear enough in context; it means "another signatory of the Convention, like the United States, as opposed to nonsignatories."

This reading of Article I, in contrast to a reading that would preclude enforcement in U.S. courts of awards rendered in this country, is supported by the U.S. implementing legislation: Chapter 2 of Title 9 authorizes the enforcement of arbitration awards in disputes wholly between U.S. citizens if, as here, the dispute arose out of a contract involving performance in a foreign country. 9 U.S.C. § 202. It could be argued that in so providing section 202 goes further than the Convention. An arbitration award made in *and* sought to be enforced in the United States is a domestic award according to traditional principles of Anglo-American conflicts of law, under which the law of the place of the award determines whether the award is valid. *Restatement (Second) of Conflicts of Law* § 220, comment c (1971). And the Convention excludes domestic awards. The alternative is to view section 202 as defining nondomestic award in Article I(3) (more precisely as redefining it, altering the traditional Anglo-American approach)—or indeed as going beyond the Convention. We need not decide. MMP does not argue that section 202 is invalid, whether or not it tracks the Convention; nor could it argue that, for the statute is comfortably within Congress's commerce power. And if it thus is valid, it doesn't matter whether it goes beyond the Convention.

This makes the language of section 202 critical. The section adopts the provisions of the Convention for any "arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title"—that is, either a "maritime transaction or a contract evidencing a transaction involving commerce," 9 U.S.C. § 2—provided only that if the relationship is entirely between U.S. citizens, it must involve performance abroad or have some other reasonable relation with a foreign country. There is no ambiguity; the relationship between Lander and MMP falls squarely within the inclusion and outside the exclusion. Congress may have believed that confining enforcement under the Convention to awards rendered abroad would drive away international arbitration business from New York. Or it may have been seeking to secure the Convention's benefits, on the basis of reciprocity, to American businesses seeking judicial enforcement of foreign arbitration awards in the countries in which the award was made. Or it may simply have wanted to simplify the procedures governing the foreign activities of American firms, since American firms doing business abroad are bound to have contracts with foreign firms as well as other American firms. Whatever Congress's precise thinking on the matter, it spoke clearly.

The only other appellate court to have addressed the question whether the Convention applies to suits in the United States to enforce arbitration awards made here has held that it does apply, as we hold today. *Bergesen v. Joseph Muller Corp., supra.* The case differs from ours insofar as the disputants were both foreign corporations, but it is a difference irrelevant to the Second Circuit's reasoning or our own in this case.

The judgment of the district court is reversed with instructions to reinstate Lander's suit.

REVERSED.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: February 18, 1997

BEFORE:

Honorable RICHARD A. POSNER, Chief Judge
Honorable JOHN L. COFFEY, Circuit Judge
Honorable DIANE P. WOOD, Circuit Judge

No. 96-2684

LANDER COMPANY, INCORPORATED,
a New Jersey Corporation,

Plaintiff-Appellant

v.

MMP INVESTMENTS, INCORPORATED
an Illinois Corporation,

Defendant-Appellee

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Appeal from the United States District Court
for the Northern District of Illinois, Western Division
No. 95 C 50325—Philip G. Reinhard, Judge

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The judgment of the District Court is REVERSED, with costs, in accordance with the decision of this court entered on this date.

927 F.Supp. 1078

**LANDER CO., INC., a New Jersey Corporation, Petitioner,**

**v.**

**MMP INVESTMENTS, INC., an Illinois Corporation, Respondent.**

**No. 95 C 50325.**

United States District Court,
N.D. Illinois,
Western Division.

June 4, 1996.

* * * * *

MEMORANDUM OPINION AND ORDER

REINHARD, District Judge.

INTRODUCTION

Petitioner, Lander Co., Inc., filed a petition to confirm an arbitral award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (Convention) issued by an arbitrator in New York, New York on October 31, 1995. Jurisdiction is alleged under 9 U.S.C. §§ 1, 9, 201, 202, 203 and 207, as well as 28 U.S.C. § 1332 and venue is proper pursuant to 9 U.S.C. § 204.[1] Respondent, MMP Investments, Inc.,

[1] The petition to confirm actually presents solely a federal question arising under Title 9 and, thus, 28 U.S.C. § 1331 provides the proper basis for jurisdiction. The allegations pertaining to diversity jurisdiction under section 1332 are merely surplusage as there are no non-federal claims presented by the petition to confirm.

has moved to dismiss the petition to confirm. Alternatively, respondent requests leave to present a complete record of its defenses under Articles IV and V of the Convention. Petitioner, in response to this latter request, asks this court to order respondent to post a bond to secure payment of the arbitral award.

## FACTS

The following facts are taken from the petition to confirm and are viewed in a light most favorable to petitioner, the non-moving party.[2] According to the allegations of the *1079 petition, in March 1991 petitioner and respondent entered into a written distributorship agreement which provides that respondent would be the exclusive distributor of petitioner's products in Poland for a period of two years. The distributorship agreement further provides, in pertinent part, that respondent will "distribute and advertise" petitioner's products in Poland.

In February 1993, the parties entered into a technical service agreement under which respondent became the

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[2] Respondent, in its motion to dismiss, refers to Fed.R.Civ.P. 81(a)(3) and 12(b)(6) as its procedural basis for dismissal. Rule 81(a)(3) provides, in relevant part, that the rules of civil procedure apply in proceedings under Title 9 of the United States Code "only to the extent that matters of procedure are not provided for in [Title 9]." Thus, because Title 9 does not contain a provision applicable to a motion to dismiss a petition to confirm, Rule 12(b) applies. Rule 12(b)(1), rather than Rule 12(b)(6), is the proper procedural basis for the motion to dismiss, however, as the motion challenges the jurisdictional basis of the petition, that is, whether this court has the authority to confirm the arbitral award under the Convention. Applying Rule 12(b)(1), the court must accept all well-pleaded factual allegations as true and draw all reasonable inferences in favor of the plaintiff. *Rueth v. U.S. E.P.A.*, 13 F.3d 227, 229 (7th Cir.1993).

exclusive manufacturer and distributor of petitioner's products in Poland for five years. Further, the technical service agreement states, in relevant part, that respondent "will use its best efforts to promote the sale of a maximum quantity" of petitioner's product "including the establishment and development of a competent sales force of adequate size and appointment of capable sub-distributors and an experienced advertising consultant." The technical services agreement also provides that all notices be sent to Michael Mucha of MMP Investments in Cary, Illinois and also to "MMP-Poland . . . Attn: Jacek Slowakiewicz." Respondent is further required under the technical services agreement to carry adequate product liability insurance to protect and hold harmless petitioner in Poland.

Both agreements contain an arbitration clause which requires that any controversy arising under the agreements be arbitrated in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce with said arbitration being conducted in New York, New York. The agreements also provide that they shall be construed in accordance with New York state law.

In May 1993, a controversy arose out of the agreements to the extent that respondent claimed that certain products it received from petitioner were defective. In an effort to cure the alleged problems, petitioner's chairman of the board visited Poland. In February 1994, petitioner sent respondent a final termination notice.

Pursuant to the arbitration clause in the agreements, respondent filed a request for arbitration with the International Court of Arbitration of the International Chamber of Commerce (ICC Court). After the parties submitted their pleadings, the ICC Court appointed a sole arbitrator from New York to hear the dispute.

In January 1995 the arbitrator and the parties executed a terms of reference in which they acknowledged that the arbitral tribunal was properly constituted and that the arbitrator had jurisdiction. In July 1995, hearings were conducted, and the parties submitted exhibits and briefs. The arbitrator issued his award on October 31, 1995 in favor of petitioner for $536,444.

## CONTENTIONS

Respondent contends that the petition to confirm should be dismissed because where, as here, an arbitral award is issued in the United States and is based on an agreement between two United States companies, providing that New York law will apply, it does not fall within the definition of a recognizable and enforceable award under the Convention. Petitioner responds that in light of the language of section 202 of the implementing legislation, 9 U.S.C. § 202, the arbitral award is recognizable and enforceable under the Convention because the agreements call for performance in a foreign state.

## DISCUSSION

The court begins by noting the dearth of cases interpreting the Convention and its implementing legislation under Title 9. Furthermore, the parties have accurately described this case as one of first impression. The court has found no other case addressing the applicability of the Convention to an arbitral award[3] between two domestic

[3] The case of *Fuller Co. v. Compagnie Des Bauxites De Guinee*, 421 F.Supp. 938 (W.D.Penn.1976), while somewhat similar to the present case, is distinguishable as in that case one party sought to have the district court order arbitration under the Convention rather than having an arbitral award confirmed thereunder. *See Fuller*, 421 F.Supp. at 941 n. 3.

companies, *1080 under domestic law, entered into in the United States with agreements calling for performance in a foreign country. Nonetheless, the court considers this case to boil down to the singular issue of whether the provisions of the agreements calling for performance in Poland are sufficient to bring the arbitral award within the terms of the Convention.

To properly assess this issue, it is first necessary to look to the history behind the Convention. A proposed draft of the Convention called for it to apply only to arbitration awards rendered in a country other than the one wherein enforcement was sought. *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 931 (2d Cir.1983). Such a proposal was controversial, however, because some countries did not want an arbitral award to be defined only on a territorial basis, i.e., by the country in which it was entered. *Id.* As an alternative to the territorial definition, several countries proposed that the Convention apply to arbitral awards other than those considered as domestic in the country in which they are relied upon. *Id.* Other countries, including the United States, urged adoption of a territorial criterion only. *Id.*

Eventually a compromise was urged whereby both criteria would be included. *Bergesen*, 710 F.2d at 931. This compromise was intended to restrict the territorial concept. Id. Thus, the final language of the Convention provides that the "Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought . . ." and that it "shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." Convention, Art. I, § 3.

To assure accession to the Convention by the greatest number of countries, two reservations were included in Article I(3). *Id.* The one of relevance to this case provides that "any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State." Convention, Art. I, § 3. The United States made such a declaration in acceding to the Convention. See 9 U.S.C. § 201 (listing declarations of various acceding nations and quoting that the United States "will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State"); *see also Bergesen*, 710 F.2d at 932 (citing Presidential Proclamation, 21 U.S.T. 2517, T.I.A.S. No. 6997 (Sept. 1, 1970)). The adoption of the declaration does not, however, give rise to a narrow interpretation of the Convention. *Bergesen*, 710 F.2d at 933. This is so because the Convention should be interpreted broadly to effectuate its recognition and enforcement purposes. *Id.* (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n. 15, 94 S.Ct. 2449, 2457 n. 15, 41 L.Ed.2d 270 (1974)).

In deciding the issue in this case, the court will look first to the terms of the Convention itself. Article I(1) states, in pertinent part, that the "Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought . . ." The parties here do not contest, and rightfully so, that the arbitral award at issue implicates the Convention under this "territorial" provision. The arbitral award at issue was clearly made in the United States.

The second relevant portion of Article I(1) provides that the Convention "shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." The Convention itself does not define what is meant by a non-domestic award. Petitioner asserts that such a definition is provided by section 202 of the [sic] Title 9. This assertion, however, overlooks the declaration of accession wherein it is stated that the United States "will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only awards made in the territory of another Contracting State." This declaration, by its express terms, limits the *1081 enforcement and recognition of arbitral awards on a territorial basis, that is, to those made in a country other than the United States.

The language of section 202 of Article 9 does not alter this interpretation. Section 202 merely states, in relevant part, that an award arising out of a commercial relationship "entirely between citizens of the United States" shall not fall under the Convention "unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relationship with one or more foreign states." The court does not interpret this language as expanding the scope of the Convention or as being inconsistent with the United States' declaration to apply the Convention on a territorial basis only, *see Bergesen*, 710 F.2d at 931.

First, the language is cast in terms of exclusion rather than inclusion. But it does so based on the status of the parties rather than the origin of the award. Hence, if two citizens of the United States obtain an award in another country (an award that would otherwise be enforceable under Article I(1) of the Convention) that award is excluded from being enforced under the Convention notwith-

standing its otherwise enforceability under the territoriality provision of Article I(1) of the Convention. This limitation is itself limited, however, by the qualifying language that makes the award enforceable if it involves property abroad, envisages performance or enforcement abroad, or has some other reasonable relation to a foreign country. Thus, an award from another country that involves as parties two citizens of the United States may nonetheless be enforceable under the Convention if it meets one of the foreign relationship criteria set forth in the qualifying language. The qualifying language does not, however, serve to expand the scope of the Convention, as acceded to by the United States, to include an award between United States' parties issued in the United States. Such an interpretation would create an inconsistency between the accession declaration of the United States and the implementing language of section 202 of Article 9. The court will not reach such an anomalous result when a consistent interpretation is reasonably available. Furthermore, there is nothing in the legislative history which detracts from this interpretation.

Nor does the court agree with petitioner's contention that such language defines non-domestic arbitral awards. First, as the court has already discussed, the accession declaration of the United States effectively negates the non-domestic award option of Article I(1). Accordingly, there would have been no need to define a non-domestic award via the implementing legislation. Second, had Congress intended to do what petitioner suggests, it could have done so in a much more clear and straightforward manner rather than by backing into such a definition via language designed to limit a limitation. See A.J. van den Berg, When is an Arbitral Award Nondomestic Under the New York Convention of 1958?, 6 Pace L.Rev. 25, 48-49 (1985).

In reaching its conclusion, the court does not consider *Fuller Co. v. Compagnie Des Bauxites De Guinee*, 421 F.Supp. 938 (W.D.Penn.1976), to support a different result. That case addressed the issue of whether two United States parties to an agreement could be compelled to arbitrate under the terms of the Convention. As the *Fuller* court itself noted, that is a different situation from one concerning the recognition and enforcement of an arbitral award. *Fuller*, 421 F.Supp. at 941 n. 3. The *Fuller* case is distinguishable from the present case and its reasoning is not persuasive on the issue before this court.[4]

## CONCLUSION

For the foregoing reasons, the court grants respondent's motion to dismiss the petition to confirm an arbitral award and *1082 dismisses this cause in its entirety. Accordingly, respondent's motion for an order requiring a bond to be posted is denied as moot.

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[4] Similarly, while the general propositions in *Bergesen* are helpful to an understanding of the history and purpose of the Convention, that case is readily distinguishable on its facts, i.e., it concerned two foreign parties seeking confirmation of an arbitral award made in the United States. More importantly, the *Bergesen* court's reliance, in part, on the language in section 202 of Title 9 in defining a non-domestic award under Article I of the Convention lacks efficacy here as this court had determined that the United States did not adopt the non-domestic option of Article I.